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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/510,126	10/04/2004	Gerardo Perez-Camargo	115808-511	6573
29157	7590	09/07/2007	EXAMINER	
BELL, BOYD & LLOYD LLP			BARHAM, BETHANY P	
P.O. Box 1135				
CHICAGO, IL 60690			ART UNIT	PAPER NUMBER
			1615	
			NOTIFICATION DATE	DELIVERY MODE
			09/07/2007	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/510,126	PEREZ-CAMARGO ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	Bethany P. Barham	1615

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 15 August 2007.  
 2a) This action is FINAL.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 38-71 is/are pending in the application.  
 4a) Of the above claim(s) 38-47 and 61-71 is/are withdrawn from consideration.  
 5) Claim(s) \_\_\_\_\_ is/are allowed.  
 6) Claim(s) 48-60 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ .                                    |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____.<br><br>   | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### **Summary**

Applicant is reminded that the office has not received IDS as of this date.

Receipt of Applicant's Response filed on 08/15/07 is acknowledged. Claims 38-71 are pending. Claims 48-60 are rejected.

Applicant's election of Group II (Claims 48-60) **without traverse** is acknowledged. Claims 38-47 and 61-71 are withdrawn from consideration as non-elected species. The Restriction/Election is deemed proper and is hereby made final.

## DOUBLE PATENTING

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 48-60 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 39-60 of U.S. Patent No. 10/509,949. Although the conflicting claims are not identical, they are not patentably distinct from each other because they claim substantially identical nutritional management regimens with an intestinal mucosa function-promoter and also pancreatic function promoter and/or liver function promoter.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

/

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 48-55 and 58-60 are rejected under 35 U.S.C. 102(e) as being anticipated by US 6,471,999 ('999).

The limitations of claims 48-53 are taught:

- '999 teach a pet milk powder as nutritional milk that results in reduced gastrointestinal intolerance (abstract). '999 teaches that the milk powder when administered in an effective amount with the nutritional composition reduces gastrointestinal intolerance and that it may further comprise one or more lipid source, protein source, vitamins and minerals, and teaches a specific aspect which comprises lactose (of micro-organism origin), lactase, taurine, arginine and choline (claims 1-9; col. 2, lines 9-lines 26).
- '999 teaches including an alkali in the milk-based powder, which slows the pH, drop in the gastrointestinal tract (col. 2, lines 53-55). '999 teaches that a protein source of whey protein and further supplemented with taurine and a probiotic micro-organism which beneficially effects the host by improving its intestinal microbial balance, such as lactic acid (col. 3, lines 25-40).
- '999 teaches chicory fibers, inulin, fructooligosaccharides with the probiotic micro-organism have a symbiotic relationship for promoting beneficial effects (col. 4, lines 9-14).
- '999 teaches that the amount of nutritional composition is to be fed to a mammal each day depends of factors such as age, type of mammal (dogs and cats), and other nutritional sources (col. 4, lines 25-36).
- Examples 1 and 2 teach mixing the milk powder, galactosidase (lactase amino), vitamins, minerals, and soybean oil, and adding water to provide nutritional supplement to dogs and puppies or cats.

The limitations of claims 54-60 are taught:

- '999 teaches that a protein source of whey protein and further supplemented with taurine and a probiotic micro-organism which beneficially effects the host by improving its intestinal microbial balance, such as lactic acid (col. 3, lines 25-40).
- '999 teaches omega fatty acids such as soybean oil and in Examples 1-2 (col. 3, lines 15-20).

Therefore, '999 anticipates the instant claims 48-60.

#### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 48-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fuchs et al WO 02/15719 ('719).

The limitations of claims 48-51 and 54-56 are taught:

- '719 discloses a method of treatment which comprises administering an effective amount of the composition which contains whey protein (an intestinal mucoas function promoter according to applicant) to improve, promote, maintain intestinal function and mucins a patient or companion animal (abstract, claims 1-2 and 14-20, pg. 6 lines 5-10; pg. 12 lines 3-21). Example 4 teaches a nutritional

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supplement comprising whey protein and probiotic bacteria. '719 teaches that the nature of whey protein and the fact that it is capable of being easily digested, the composition has a beneficial effect in patients with limited appetite due illness, surgery, chronic gastritis, etc (pg. 4, line 31-pg. 5, line 6), and that the addition of a probiotic micro-organism provides the advantage of restoring the natural balance of the intestinal flora following antibiotic therapy (pg. 6, lines 7-10).

- Whey protein is taught by applicant to be a fat transportation aid agent and carrier (instant spec pg. 10, 13-20).
- '719 also teaches including a prebiotic (claim 13, pg. 5, lines 27-30).

The limitations of claims 52-53 and 58-60 are taught:

- '719 teaches including taurine and vitamins (claim 12, pg. 5, lines 18-25; pg. 6, lines 27-29)
- '719 teaches a lipid source including omega-3 fatty acids (abstract, claim 1).
- '719 teaches a nutritional supplement comprising whey protein and omega-3 fatty acids (abstract, claims 1-2).

Claims 48-49, 52-55, and 58-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over US 5,290,571 ('571) or US 5,451,412 ('412).

The limitations of claims 48-49, 52-55 and 58-60 are taught:

- '571 or '412 teach a composition of whey protein concentrate (abstract). '412 claims 1 and 2 teach compositions containing whey protein concentrate that promote glutathione as nutritional supplements to animals.
- '571 teaches that a suitable source of whey protein is known by the trademark PROMOD, which contains whey protein and soy lecithin (col. 5, lines 34-41). Soy lecithin is taught by applicant in instant Example 2 to be an appropriate liver function promoter.
- '571 teaches that glutathione GSH promotion is a major function of the whey protein concentrate (w.p.c.) (col. 1, lines 30-37). '571 teaches the production of glutathione in the spleen, heart, liver is greater in mice fed with w.p.c. than mice fed with egg white protein (col. 4, lines 39-46). '571 teaches that the object of the invention is to provide a method for increasing the concentration level of glutathione in the organs and enhancing resistance to bacterial infection of mammals through the use of w.p.c. via oral administration (col. 10, lines 46-57).
- '571 also teaches inclusion of vitamins B1 and B2 with w.p.c. (claim 1-3, col. 11, lines 55-57).

### ***Correspondence***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Bethany Barham whose telephone number is (571)-272-6175. The examiner can normally be reached on Monday to Friday; 8:30 a.m. to 5:00 p.m. EST.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Woodward can be reached on (571) 272-8373. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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